STATE OF MICHIGAN

COURT OF APPEALS

JOHN WEAVER,

Plaintiff-Appellant,

v

TIP TOP PARTY STORE, INC.,

Defendant-Appellee.

UNPUBLISHED
February 2, 1999

No. 206787
Oakland Circuit Court
LC No. 96-534640 NO

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. We affirm.

Plaintiff fell in the parking lot adjacent to defendant's store. A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against. *Butler v Ramco-Gershenson*, 214 Mich App 521, 532; 542 NW2d 912 (1995), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). An invitor must warn of hidden defects, but is not required to warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90-95; 485 NW2d 676 (1992). Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Plaintiff claims that an oily spot in the parking lot caused him to slip and fall. Plaintiff acknowledged that he had frequented defendant's store on a nearly daily basis for a couple of years preceding his fall. He admitted that the oily spots were clearly visible and he claimed that they had existed for quite some time. Plaintiff also admitted that he was not watching where he was walking when he slipped on one of the oily spots. The trial court, after reviewing the briefs, which included photographs which clearly showed the oily spots, and after hearing oral argument, determined that the

condition was open and obvious and, therefore, defendant was under no duty to warn plaintiff of the condition. We agree and find that the court's ruling was proper. We also note that plaintiff has not produced any evidence that the oily spot in defendant's parking lot was unusual because of its character, location, or surrounding conditions. *Bertrand*, *supra* at 617.

Although plaintiff claimed in his complaint that it was the oily spot that caused him to slip, he now alleges that it was a depression in the pavement obscured by the water/oil puddle that caused his fall. The evidence presented by plaintiff fails to support his allegation and, to the contrary, corroborates the trial court's finding that the condition was open and obvious.

Finally, plaintiff argues defendant breached its duty to maintain the parking lot in a reasonably safe condition. Since the trial court did not reach the factual issue of breach of duty, we decline to address it here.

Affirmed.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot